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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 113.

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KENTUCKY, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, APPELLEE.

No. 114.

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vs.

CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KENTUCKY, APPELLEES.

REPLY BRIEF FOR FIRST NATIONAL BANK.

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REPLY BRIEF.

Our original brief so fully anticipates most of the argument of our opponents as to make necessary reply to very few points.

The statement (*Brief, p.* 1) that out of about one hundred national banks ninety-five are paying taxes and the state-

ment (*p.* 15) that State banks in Kentucky do not own United States bonds because an unprofitable investment have no foundation in the record, and no relevancy if true.

The statement (*p.* 2) reciting the action of Judge Evans and the statement (*p.* 24) reciting the action of Judge Cochran are misapprehensions of the decisions of those judges. (*See Rec., pp.* 61, 89.)

We shall notice very briefly the points made by our opponents:

First (*Brief p.* 26). "The judgment relied on as *res adjudicata* and pleaded as an estoppel herein is not conclusive of the facts and the law raised in the case at bar;" and

Secondly (*Brief, p.* 18). "That it is a well-settled principle that the decisions of the State courts in the construction of a State constitution and laws are to be adopted by the Federal courts."

Thirdly. "Discrimination in the act of *March* 21, 1900."

I.

In our original brief we showed, and it was also shown by Judge Cochran, circuit judge, that the Campbell circuit court, in the decision upon which we rely as *res adjudicta*, and the Kentucky court of appeals expressly adjudged the existence of a contract made in May, 1887, between appellant bank and the Commonwealth of Kentucky for payment by the bank as taxes upon its shares of capital stock of seventy-five cents per share of $100 in lieu of all other taxes, as well upon the bank as upon its shares, State, county, or municipal. Our opponents' point now made is that the decision of the Campbell circuit court and the appellate court was simply that the bank was entitled to an injunction against the city taxes for the year 1893 under the act of 1892, and

that the present claim of the city is for taxes for subsequent years under the act of March 21, 1900, a claim made in a subsequent proceeding "where the questions, issues, facts, and circumstances are not the same in the subsequent proceedings as in the former" (*p.* 29). This point is simply a restatement in a different shape of the question discussed in our original brief, and of the question discussed by our opponents under their third heading (*pp.* 16 *to* 27).

It is true that in the suit in the Campbell circuit court only an injunction against the taxes for the year 1893 assessable under the act of 1892 was sought; also true that the only relief therein granted was such injunction against such taxes. It is likewise true that under the decisions of this court and of the Kentucky court of appeals an adjudication on liability for taxes for one year is not an adjudication of the liability for taxes for subsequent years upon the same property, but the point now made loses sight of the fact that the ground upon which the adjudication was made in the case in the Compbell circuit court was that the bank had *a contract with the State to pay taxes of seventy-five cents per share upon all its shares of stock and an immunity from all other tax issues*, as well upon the bank as upon its shares, and that it was upon the ground of such immunity that its injunction was granted against taxation under the act of 1892, which was such taxation as came within its exemption or immunity under its contract. The fact, therefore, that the "questions, issues, facts, and circumstances" were different in the two cases is immaterial. The adjudication which is conclusive in the first case is the adjudication of the existence of the contract and its effect, and this adjudication covers the same question when it arises in the subsequent case, regardless of whether the "issues, facts, and circumstances" in the two cases are the same or different. This is the decision of this court in *New Orleans vs. Citizens' Bank*, and *Deposit Bank v. Frankfort*, 191 *U. S.*, 499.

In *New Orleans v. Citizens' Bank* this court said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text books and enforced by many decisions of this court."

Again:

"Accepting this argument (that courts have jurisdiction of taxes but their judgments no conclusiveness) in its full consequence every judgment rendered by this court from the foundation of the Government, declaring a particular tax, or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted where the right to the tax was a part of the obligation is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation such an estoppel cannot also result from a judgment enforcing taxation."

How these principles can be doubted, or these conclusions escaped passes comprehension.

In *Deposit Bank v. Frankfort* this court, reaffirming the doctrines just invoked, said (*p.* 512):

"Again, it is urged that the taxes herein involved are those for different years than were under consideration and covered by the decree of the Federal court relied upon. The *vice* of this argument consists in assuming that the taxes for specific years were alone involved and covered by the decree of the court.

"The controversy was as to the force and effect of the Hewitt law as a contract; not for one year, but for all years; not for one assessment, but for all assessments of taxes upon certain property of the bank. The contest was over the contract, and the consequent want of power to collect any and

all taxes, the assessment of which did violence to the contract rights of the bank.

"The court had jurisdiction of the parties and of the subject-matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by State legislation within the right guaranteed by the Federal Constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank."

The Hewitt Law (*Rec., p.* 3) provided:

"That shares of stock in State and national banks, &c., &c., shall be taxed seventy-five cents on each share thereof equal to $100.00, or on each $100.00 of stock therein owned by individuals, corporations, &c., and said banks, &c., shall in addition pay upon each $100.00 of so much of their surplus, &c., &c., the same rate of taxation as is assessed upon real estate which shall be in full of all tax, State, county and municipal." (*See Orig. Brief, p.* 2; *Rec., p.* 3.)

It is thus apparent that the Hewitt law provided for taxes upon "shares of stock in State and national banks," and provided that such taxation "shall be in full of all tax, State, county and municipal."

The Hewitt law also provided:

"And upon such agreement or consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of the bank." (*See Orig. Brief, p.* 3; *Rec., pp.* 3, 4.)

It is, accordingly, perfectly clear that our contract has been established by the highest Kentucky court, and that by it we are exempt from all taxation on *the "bank and its shares of stock during the corporate existence of the bank" (until November*, 1904).

Moreover, this is recognized by the State, and, notwithstanding the act of March 21, 1900, while the city is assum-

ing to assess us, the State is treating us like the other banks included in the *first* bank tax cases, and is receiving our taxes under our contract made pursuant to the "*Hewitt law*" (*Rec., p.* 5). The State and its municipalities are for this reason also estopped to deny our contract.

It appeared in the case in the Campbell circuit court that the bank had paid the tax upon the shares and claimed an exemption from all other taxation, and it was upon this ground as well as another ground that that court granted the bank's injunction, but was upon this ground alone that the court of appeals affirmed the judgment of the Campbell circuit court. The adjudication, therefore, was that taxation at the rate of seventy-five cents *per* share of stock of $100 per share was assessable against the bank, and that such taxation was in full of all taxation of bank or shares. It matters not, therefore, what particular form the litigation may have assumed either in the Campbell circuit court or in the court below, the adjudication relied on by the bank was the adjudication that it had a contract to pay seventy-five cents per share upon the shares of its capital stock in full of all taxation aforesaid.

The *act of March* 21, 1900, seeks to assess the bank exactly as did the *Hewitt law*, but at a different rate (*Rec., pp.* 9, 10). The proposition now is to tax the bank, under the act of *March* 21, 1900, as much as $2.09½ upon each $100 in one year (*Rec., p.* 80).

Section 1 declares "that the shares of stock in each national bank" shall be subject to taxation, &c.

Section 2 provides that the president or cashier shall list the shares with the assessor, "and the banks shall be and remain liable to the State, county, city, town, and district for the taxes upon said shares of stock." The proposition, therefore, now is to tax the bank upon the same shares upon which it has been taxed and upon which it has paid under the *Hewitt law*, but tax it at a higher rate.

The act in full is as follows:

"An act relating to the taxation of the shares of stock of national banks.

"Whereas, the Supreme Court of the United States has lately decided that article three (3) chapter one hundred and three (103) of the acts of eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SECTION 1. That the shares of stock in each national bank in this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

"SEC. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

"SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: *Provided*, That where any national bank has heretofore, for any year or years paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years: *And provided further*, That where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said

bank shall be entitled to credit by said excess upon its State taxes required by this act.

"SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"SEC. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

"SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

"SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

Approved March 21, 1900.

The question, therefore, which was actually decided by the Campbell circuit court and the Kentucky court of appeals was that the bank had the contract it claimed, to pay 75 *cents per share* of $100 each on its shares of stock in full of all taxation on bank or shares, and it is this adjudication of such exemption which it now invokes to defeat the taxation attempted in the *act of* 1900, and the way in which the question may have arisen in the former case, or now arises in this case, is immaterial.

II.

Our opponent's point (III, *pp.* 16 and 18) is based upon a misapprehension of the principle "that the decisions of the State courts, in the construction of a State constitution and laws, are to be adopted by the Federal courts." When prop-

erly applied no principle is better established, but here a misapplication is made.

Unquestionably, in the construction of the faith and credit clause of the Constitution, the same force must be given in other courts to the judgment of a court of any State which is given in the State where rendered. This doctrine, however, has no application to the case of impairment of the obligation of contract, for that presents, not a State, but a Federal question, and upon every Federal question the Federal courts, and this court on writ of error to the State court, will place their own construction and will never follow the State court except where its opinion coincides with the Federal courts'.

Our opponent remarks that it is now established that the "Hewitt law" made no irrevocable contract, and that our contention is based solely upon adjudication by a State court of the existence of such irrevocable contract.

This court has several times considered the effect of a State judgment as a contract impairment whereof was forbidden by the Federal Constitution, but in none of the cases was the judgment based upon a contract. If a judgment based upon a contract be not a contract protected by the contract clause of the Federal Constitution, then one having a contract loses the protection of the Federal Constitution by merging his contract into a judgment—the only way by which his contract can be enforced. We should, therefore, have a *reductio ad absurdum*, for it cannot be assumed that a contract is protected from impairment by the Constitution provided only that its holder will not undertake to enforce it in the only way wherein it can be enforced, *viz.*, by judgment. We conclude, therefore, that if a judgment be based upon a contract it must be within the protection of the contract clause of the Constitution as well as the original contract was, and this observation distinguishes the cases of *Garrison vs. New York*, 21 Wall., 196; *Louisiana vs. Mayor*,

109 U. S., 285, and *Morley vs. Lake Shore R. Co.*, 146 U. S., 166.

In *Garrison vs. New York* this court held that the legislature might provide for an appeal from a previous report of damages in favor of Garrison as compensation for land taken for public use. In holding that Garrison's award was not a contract exempt from impairment this court indicated that there was no element of mutual assent in the case, and indicated the absence of the other constituents of a contract. That inasmuch, therefore, as Garrison had no contract, but only a judgment, his judgment constituted no contract.

In *Louisiana vs. Mayor* this court said that a judgment in *tort* constituted no contract, and therefore the laws providing for taxation to raise money to satisfy such judgments might be changed by legislation without impairing any contract. The considerations involved in this decision were similar to those involved in *Garrison vs. New York*.

In *Morley vs. Lake Shore R. Co.* this court held that a judgment for interest was not a contract; that interest was itself no element of a contract, but constituted damages prescribed by statute for the forbearance of money.

In all these cases, therefore, this court, in holding that the judgments were not contracts within the intendment of the contract clause of the Constitution, emphasizes the fact that the causes of action upon which the judgments were based were not contracts. We are now confronted with a case of judgment based upon a contract, and we claim protection for that judgment. This court has universally held that it will itself determine whether or not a contract exists, as well as if it has been impaired. As said in our original brief, if the court may not give an independent judgment upon the existence or absence of contract, the State court may, in every instance, defeat the contract by denying its existence instead of denying its impairment. The principle is applicable here, for after the contract may have been merged in judgment if this court cannot give an independent judgment

upon the existence of the contract, then the contract is within the power of the State court to abrogate, for the original contract upon which this court would give an independent judgment has been merged and there remains but the judgment of the State court, and upon that it is now claimed that this court must give only such judgment as it may understand that the State court would give. We submit, therefore, that where a judgment is based upon a contract this court should give to the judgment the same independent consideration which it would give the contract upon which the judgment were based if there were a claim of the impairment of that contract.

A decision sustaining our contention to the letter, although not proceeding upon the exact lines above indicated, is *Bank vs. Stone, aforesaid* (88 *Fed. Rep.*). In that case Mr. Justice Harlan and Judges Taft and Lurton held that the *first* bank tax cases constituted *res adjudicata* of the existence of the contract under the "Hewitt law," like the contract upon which we rely. We have quoted at length from the opinion in that case in our original brief, *pages* 28, 29. In addition to what we quoted we would invoke the argument of that opinion on *page* 395, where, after noting the difference between the scope of the exemption in *New Orleans vs. Citizens' Bank* and that provided by the "Hewitt law," the court said:

"In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt act is that 'such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of the bank.' If this exemption clause is irrevocable, it certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable, and prevented the imposition of a tax even in the form of a license tax upon its business," &c., &c.

Further said, *page* 396, that the taxing authorities were estopped by former adjudication, and that

"It is suggested that such a conclusion ousts this court of jurisdiction, because it makes the case turn on a question which does not arise under the laws or Constitution of the United States. We cannot assent to this suggestion. The complainant asserts that it has a contract with the Commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of Frankfort, and the county of Franklin, by the enforcement of a subsequent law of the State, are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties, such a contract exists. It appears that, as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties; but it does not free the court from the obligation to enfore the Constitution of the United States, in favor of the complainant, by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established. The case of City of New Orleans *v.* Citizens' Bank of Louisiana, 167 U. S., 371, 17 Sup. Ct., 527, which presented precisely this aspect, was begun in the circuit court of the United States, and was carried to the Supreme Court of the Unitd States, and the jurisdiction by the circuit court was not even questioned."

Further said:

"Such decision, embodied in a judgment unreversed, is as binding with respect to the point adjudged as if it had been rendered by the Supreme Court of the United States. The distinction between the right and duty of the Supreme Court to decide for itself the question of contract or no contract without regard to the State decisions, and its obligations to respect the bar of *res judicata* as between the parties, is quite clearly made in Douglass *v.* Kentucky, 168 U. S., 488, although not expressly commented on."

Bank vs. Stone (88 *Fed. R.*, 383) was affirmed by this court, as said in original Brief, *p.* 26, in 174 *U. S.*, 799. Moreover,

as shown in original Brief (*pp.* 31 *et seq.*), there is no such Kentucky rule, as supposed, forbidding conclusiveness to an adjudication of a contract exemption in a tax case.

III.

In our original Brief (*p.* 19 *et seq.*) we contended that the act of March 21, 1900, was not authorized by *section 5219* of the Revised Statutes of the United States. To this our opponents make various responses—*e. g.* (*Brief, p.* 13), that our contention "is directly the reverse" of the position of the Owensboro Bank, sustained by this court in 173 *U. S.*, 662, 664; that Kentucky State banks own no Government bonds, they being an unprofitable investment (*Brief, p.* 15); that in assessing the shares of appellee bank its real estate will be deducted.

A moment's attention to these claims will suffice to destroy them:

a.

True, this court sustained the claim of the Owensboro Bank that under the act of 1892 an assessment of its franchise and property was not the equivalent of an assessment of its shares, instancing the *Henderson Bridge* case (*our original Brief, p.* 21). But it does not follow necessarily that because assessment of franchises might be disadvantageous to national banks therefore an assessment of shares must be more favorable. The point enforced by this court was that the two methods were not *legal equivalent*, and might not be *equivalent* in fact; that "mere coincidence of the sum" of the taxes did not make equivalency in fact.

b.

To the point that State banks in Kentucky own no Government bonds, "because they are unprofitable as an investment" (*Brief, p.* 15), it suffices to respond that the condition

by the terms of the postulate will last only until such bonds become profitable as an investment. Also, to answer that the record shows nothing on the subject.

Seriously, however, the point on its merits is resolved against our opponents by *Van Allen vs. The Assessors*, cited and reaffirmed in *Owensboro vs. Nat. Bank*, reviewed in our original Brief, *p.* 22 *et seq.* If the State banks own bonds exempt from taxation they are deductible from the value of the franchise, but not deductible from the value of the shareholders' shares in national banks (*Van Allen vs. The Assessors, &c., &c.*).

c.

The foregoing observations apply to the suggestion of deducting the value of the bank's building and ground from the assessed value of the shares. The value of the tangible property of the State corporation is deductible from the value of the capital stock (*Ky. Stats., sec.* 4077 *et al.* (*Rec., p.* 55); *Henderson Bridge Co. vs. Kentucky*); but the act of March 21, 1900, makes no provision for any such deduction from the value of the shares.

Seeing this difficulty, our opponents, as aforesaid, observed (*Brief, p.* 5):

"It will be noted the value of real estate of this bank is deducted from the assessed value of the shares." (*Record, page* 80)."

There is nothing on said *page* 80 to so indicate but an answer which was stricken from the files (*Rec., p.* 84); but if the answer were in the record it could only show what assessment the assessor proposed for the years named. As soon as the assessor saw fit he might conform his usages to the act of March 21, 1900.

Section 5219 (*Rec., p.* 56) permits assessment of real estate as well as shares, and *Scobee vs. Bean* (*our original Brief, p.* 12) authorizes assessment of shares in Kentucky without de-

duction. It also assumes separate assessment of the real estate. The shares of the national bank and its real estate are therefore both assessed and the real estate deducted from the franchise value of the State bank. No wonder, therefore, that our opponents were driven (*Brief, p.* 5) to invoke their stricken answer to prove intent to make an assessment which did not discriminate as does that authorized by the act of March 21, 1900.

Conclusion.

Without further extension of this reply brief we respectfully pray an affirmance of the first, and reversal of the last decree below.

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SUPPLEMENTAL BRIEF.

Pursuant to leave, we would offer—

I.

That the decision in Commonwealth *vs.* Citizens' Bank, 80 Southwestern Rep., 158, *Ibid.*, 479, and London *vs.* Hope, *Ibid.*, 817, cannot conclude the bank's rights, because the

bank would have been assessed in 1900 had it not obtained an injunction, and assessed under the act of March 21, 1900, without regard to what the court of appeals might have thought about the act in 1904 as expounded in Commonwealth *vs.* Citizens' Bank.

The declaration of the court of appeals (80 Southwestern Rep., 160) that the assessor would be presumed to do his duty as required by section 5219, United States Revised Statutes, can have no weight in this controversy, for we claim rights under a Federal law, and the Kentucky court's opinion as to what the State assessor would do under a Federal statute (or even a State statute, for that matter) is entitled to no conclusiveness. The State court cannot, years afterward, give such a meaning to a statute as to bind this court to hold that the statute does not offend Federal laws. The principle is the same as that moving this court to form an independent judgment as to the existence or extent of a contract impairment whereof is alleged.

The statute does not require any deduction of the value of real estate from the total value of the shares of stock, nor require any deduction of the value of Government bonds or other non-taxable securities (Van Allen *vs.* The Assessors, 3 Wall., 573; Owensboro *vs.* National Bank, 173 U. S., 677).

No provision was made in the act of March 21, 1900, for any deductions, and no deductions authorized in the assessment of national bank shares until 1904 (and our charter expired November, 1904). (See Acts 1904, p. 147.)

From March 21, 1900, the State banks have been assessed by franchise and capital (Kentucky Statutes, secs. 4077, 4078, etc.), while the national banks have been assessable for State taxation under the act of March, 1900.

In cities of the first, second, and third classes State banks, by the act of March 23, 1900, have been assessed *for city taxation* upon their shares. The banks in the cities aforesaid, however, have been assessable not only for city taxation, but for county and State taxation. Accordingly, since the act

of March 21, 1900, national banks have been assessable upon their shares, and since June, 1900, State banks for city taxation have been assessable upon their shares, but the county and State taxation upon their franchises and property. (See Acts 1900, p. 59, amending sec. 1 of Acts of 1898.)

The claim in the answer (Rec., p. 80) that the real estate would be deducted from the value of the shares is unavailing, because the assessor might change his method whenever he might see fit to conform to the act of March 21, 1900, it appearing, as aforesaid, that no statute required the deduction of the national bank's real estate from the value of the shares until the aforesaid act of 1904.

Respectfully submitted.

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